No. 86214-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

Vs.

DARA RUEM

Appellant.

APPEAL FROM DIVISION II

OF THE COURT OF APPEALS

Cause No. 39053-1-II

SUPPLEMENTAL BRIEF

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Table of Contents

TABLE OF AUTHORITIES

STATE CASES

CONSTITUTIONAL PROVISIONS

I. IDENTITY OF PETITIONER

Dara Ruem, petitioner, respectfully submits this supplemental brief.

II. ASSIGNMENTS OF ERROR

The Court of Appeals erred when it determined the police properly entered and searched Mr. Ruem's residence without a search warrant and without properly informing Mr. Ruem of his rights.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Petitioner relies on the Issues Pertaining to Assignments of Error as articulated in his opening Petition for Review.

IV. STATEMENT OF THE CASE

Petitioner relies on the Statement of the Case as articulated from pages 5-8 of his opening Petition for Review

V. ARGUMENT

In addition to Petitioner's argument and authority cited on pages 8-16 of his opening Petition for Review, Petitioner offers the following argument:

A. The Court of Appeals decision is inconsistent with the state constitutional analysis under State v. Ferrier and State v. Schultz.

In Mr. Ruem's case, the state constitution provides greater protection under Article I § 7 than the US Constitution provides under the 4th Amendment. This initial issue was resolved in State v. Ferrier. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). There the court thoroughly evaluated the Ferrier case and facts while implementing the requisite Gunwall layer of analysis. Id. at 110-114, *citing*, State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). The court's look at the matter through the lens of Gunwall is an important reminder to the court as it embarks upon evaluating Mr. Ruem's case. While laying the foundation to the Ferrier decision, the court began "with the proposition that warrantless searches are unreasonable per se." State v. Ferrier, 136 Wn.2d at 111, *citing*, State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). At which point the court guardedly acknowledged consent among the "narrow" and "jealously and carefully drawn" exceptions to the warrant requirement. State v. Ferrier, 136 Wn.2d at 111, citing, State v. Hendrickson, 129 Wn.2d at 71, 72 (quoting State v. Bradely, 105 Wn.2d 898, 902, 719 P.2d 546 (1986). The court also cited State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) among its many examples from existing case law for the premise that "'in no area is a citizen more entitled to his privacy than in his or her home... ...the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" State v. Ferrier, 136 Wn.2d at 112, citing, Young, at 185. Importantly, "Under article I, section 7, '...regardless of the setting... constitutional protections [are] possessed *individually*.'" State v. Parker, 139 Wn.2d 486, 497, 987 P.2d 73 (1999), citing, State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982).

The State carries multiple burdens in cases like Mr. Ruem's where the government lacks a search warrant. First, because state citizens are afforded heightened protection against unlawful intrusions into private dwellings the government carries an "onerous burden" to "show

a compelling need to act outside of [the] warrant requirement." State v. Ferrier, 136 Wn.2d at 114, citing, State v. Chrisman, 100 Wn.2d 814, 822, 676 P.2d 419 (1984).

With this foundation, as previously noted in the Petition for Review, the State bears the burden of proving that consent was voluntary. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). The voluntariness of consent is a question of fact based on the totality of the circumstances. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Among the factors for the voluntariness of consent are whether Miranda warnings were given, the degree of education and intelligence of the person giving consent, and whether the consenting person was advised of the right not to consent. Id. The court may also consider the conduct of police as part of the factual analysis. Id.

Moreover, other factors may also be relevant depending on the totality of the circumstances. State v. O'Neill, 148 Wn.2d 564, 588-89, 62 P.3d 489 (2003). While consent may be given while an individual is under arrest, any restraint on an individual is a factor to consider. Id. at 589. Courts may also consider whether the individual signed a consent-to-search form, and whether any language was included within the consent form that indicated the right to refuse consent. State v. Smith, 115 Wn.2d 775, 790, 801 P.2d 975 (1990).

In State v. Munoz Garcia, 140 Wn.App. 609, 166 P.3d 848 (2007), Division III of the Washington Court of Appeals found a "consent" search unconstitutional given the following facts: Police "busted" a party in a hotel room where the defendant was hosting numerous minors who smelled of alcohol. Id. at 616. Stolen jewelry was found in the room. Id. The defendant was arrested and searched for safety. Id. The search revealed a glass pipe with marijuana residue and more jewelry suspected to be stolen. Id. The defendant was charged with several crimes, including felonies and taken into custody although his Miranda rights were not immediately read

to him. Id. at 617. Also, his vehicle was impounded. Id. Police asked the defendant if they could search his vehicle. Id. He agreed to allow the search *and signed a consent form*. Id. In the vehicle, police found more drugs and stolen property. Id. The defendant was read his Miranda rights the following day.

The Court in Munoz Garcia found the "consent" to be involuntary even though the defendant had signed a consent form – an option Mr. Ruem was never granted. Id. at 626. The Court found through defendant's testimony at the suppression hearing that he was tired, and the fact that his Miranda rights were not immediately read to him, to be particularly persuasive. The Court stated:

> The trial court based its conclusion that consent was voluntary largely on the fact that Mr. Munoz Garcia signed a consent-to-search form. However, no single factor is dispositive in the analysis of the voluntariness of consent. Based on the totality of the circumstances in this case, the State has not met its burden of providing by clear and convincing evidence that consent was voluntary. As a result, the trial court should have suppressed the evidence obtained from the vehicle search.

Id. at 857.

Mr. Ruem's case is analogous. Given Ruem's "heightened protection" against unlawful intrusions into his private dwelling, and the state's "onerous burden" to "show a compelling need to act outside of [the] warrant requirement" the State has the burden to prove consent was given voluntarily. Yet, the totality of the circumstances suggests that the "consent" Mr. Ruem provided lacked any of the factors illustrated throughout the body of caselaw surrounding this subject.

In State v. Johnston, 107 Wn.App 280, 284, 28 P.3d 775 (2001), the Court of Appeals emphasized it is only when *meaningful* consent is obtained that consent can overcome a search that otherwise is without authority of law. Id.

In Ruem's case, the Court of Appeals claimed existing authority supports a defendant's "...Ferrier [argument was] 'misplaced' where police entered third party's home based on defendant's arrest warrant" in State v. Bustamante-Davila, 138 Wn.2d 964, 980, 983 P.2d 590 (1999), See, Court of Appeals opinion at 8. Despite reciting the necessity of evaluating the "totality of the circumstances," the Court of Appeals in Ruem's case went on to conclude as follows: "Here, because officers knocked on Ruem's door to serve an arrest warrant on Chantha – not to seek contraband without a warrant – Ferrier does not apply." Id.

Similar to Bustamante-Davila, Ruem was not afforded any sort of Ferrier warnings of his right to refuse or conclude the warrantless search of his residence in the officer's attempt to locate his brother. Rather, despite the exhaustive policy guarantees noted above related to article I, section 7 jurisprudence, the only factors the court has to evaluate the "consent" the officer obtained was limited to the following: that the officer told Mr. Ruem he was going to go in and search; RP (2/19/09) 76-77; requested permission to enter, and Ruem gave permission, and limited the permission to crossing the threshold. Id. The Court of Appeals holding is contrary to the constitutional principles noted above. In short, Ruem was denied *meaningful* consent.

The evidence in Ruem's case does not overcome the court's previous presumptions in Ferrier that a "great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even

if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search." State v. Ferrier 136 Wn.2d at 115. Therefore, a look at the factors that are absent from the case against Ruem are important. The record makes it clear the entering officer failed to warn Mr. Ruem of his right to refuse consent to a warrantless search; the officer accordingly failed to produce any sort of consent to search form, and, accordingly and obviously, failed to elicit Ruem's signature as evidence of his awareness of his right to refuse and terminate or limit the search; the officer failed to read or inform Ruem of his Miranda warnings; there was no evidence of Ruem's intelligence or ability to understand the search that he initially allowed to commence. See, State v. Ferrier, 136 Wn.2d at 115, 116, 117, 118. This illustrates only that the agreement the officer obtained for his initial entry did not amount to *meaningful consent.* See, State v. Johnston, 107 Wn.App at 284.

The Court of Appeals relied on Bustamante-Davila for the proposition that Ferrier does not apply to cases such as Ruem's. See, Court of Appeals Opinion at 8. At this point it should be clear Petitioner believes Ferrier does apply, despite the fact that the officer who entered purported to be seeking an individual rather than contraband. That is due to Ferrier's, constitutional discussion as applied to the present case. However, given the court's recent decision in State v. Schultz, it is time for this court to revisit its holding in Bustamante-Davila, to the extent relying on Ferrier is "misplaced" where police enter a third party's home based on an arrest warrant (rather than seeking contraband).

In Schultz, the court addressed a domestic violence investigation that included police entry into a defendant's home. The entry lacked consent, was labeled an entry based on the defendant's "acquiescence," and the State attempted to justify the entry under the emergency aid

exception. See Schultz at 746-753. During the officer's time in the defendant's home, the officers observed contraband, and the defendant was prosecuted. Id.

The Schultz court addressed a warrantless entry that lacked Ferrier warnings. As a result, the court relied on Ferrier as it analyzed the constitutionality of the circumstances. Id. at 753-754, 758. Ultimately, as noted in the Petition for Review, the Schultz court held the state failed to meet its burden of establishing facts to justify a warrantless search. Id. at 761. The court relied heavily on the constitutional and policy principles in Ferrier. Clearly the Schultz court acknowledged that a search investigating persons potentially involved in criminal activity is no different than searching a residence for purposes of investigating contraband.

Furthermore, had Chantha been present in Dara's trailer, Chantha would have been "contraband" as it would have related to any potential case against Dara Ruem. As indicated, the key distinction between Ferrier and Bustamante-Davila is Ferrier dealt with a "knock and talk" scenario - where police are subjectively seeking to side-step the warrant requirement by gaining consent to search a person's home - while Bustamante-Davila did not deal with a "knock and talk" because police were not searching for contraband or evidence of a crime. However, the facts here suggest Ferrier is controlling.

In this case, police were employing the "knock and talk" procedure because the purpose of the search was to locate Chantha Ruem – a fugitive from justice. The police search of Mr. Ruem's separate residence was a search to determine whether Mr. Ruem was harboring a fugitive – a crime in Washington. Thus, like in Ferrier where police were attempting to gather evidence from within a person's home while not having to seek a warrant, the police in this case wanted to search Mr. Ruem's home to see if he was illegally harboring a fugitive.

Ruem's revocation of his initial agreement to allow the officer into his home is a matter of constitutional magnitude. See, State v. Young, 123 Wn.2d at 185 ("'...the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" quoting, State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984). Manifest errors affecting a constitutional right may be raised for the first time on appeal and are reviewed de novo. RAP 2.5(a)(3); see State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010).

The Court of Appeals acknowledged Dara Ruem ultimately indicated it was not a good time for the officer's entry into the trailer. Yet, the court did not address the issue of withdrawn consent. See, Opinion at 9 (FN 11).

Ruem clearly withdrew his consent and at that moment the search should have discontinued. Under Ferrier's policy and its explicit terms, a person may withdraw consent to search his home at any time, and may even limit the area to be searched. The officer ignored Ruem, and violated all aspects of article I, section 7 privacy articulated by the previous decisions of this court related to warrantless searches.

VI. CONCLUSION

Based on the above points and authorities, Mr. Ruem respectfully requests that this Court find the warrantless entry was illegal and suppress the resulting evidence.

Respectfully submitted this 22nd day of December, 2011.

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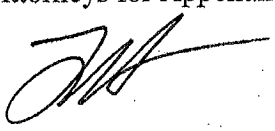

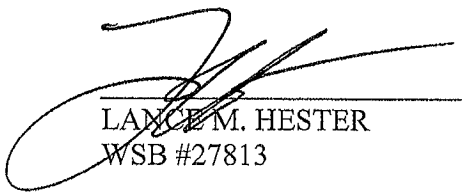

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the Supplemental Brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Deputy Prosecuting Attorney
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Tacoma, WA 98402

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Coyote Ridge Corrections Center
P. O. Box 769
1301 North Ephrata Avenue
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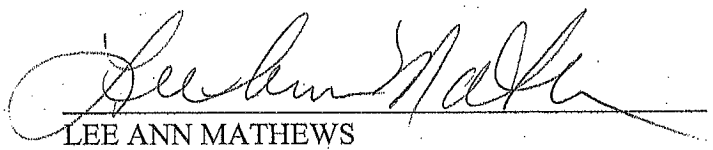
Signed at Tacoma, Washington, this 22nd day of December, 2011.



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